IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-917

VICTORIA HORWATH, ET AL.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

LOCAL LODGE 1129 and DISTRICT LODGE 8, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Intervening Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on July 15, 1976, denying a petition to review a decision of the National Labor Relations Board.

OPINIONS BELOW.

The decision of the National Labor Relations Board is reported at 219 N. L. R. B. No. 127 (1975), *sub nom Lodge*

No. 1129, International Association of Machinists and Aerospace Workers. The decision of the Court of Appeals was announced by Judge Tone. Judge Charles E. Wyzanski, Senior District Judge sitting by designation, dissented. The decision is reported at 539 F. 2d 1093 (7th Cir. 1976). Copies of these decisions are attached hereto as Appendices A and B.

JURISDICTION.

Jurisdiction of this Court is invoked pursuant to 28 U. S. C., § 1254(1). The decision of the Court of Appeals was announced July 15, 1976. Petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which was denied by order dated October 6, 1976.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether, in the context of a "maintenance of membership" union security clause, a union and an employer may manipulate the date triggering the membership obligation so as to defeat the right of employees to resign from the union protected by § 7 of the National Labor Relations Act.

2. Whether the Board's *Paulding* doctrine, which holds that union security clauses in successive collective bargaining agreements negotiated without a hiatus have unmarred continuity, is contrary to national labor policy.

STATUTES INVOLVED.

Consideration of the Petition for Certiorari will involve construction of the following provisions of the National Labor Relations Act: 29 U. S. C., §§ 157, 158(a)(2) and (3), and 158(b)(1) and (2). The text of these sections is reproduced in Appendix C.

STATEMENT OF THE CASE.

Petitioners sought review of an order of the National Labor Relations Board dismissing the unfair labor practice complaints filed by Victoria Horwath and Elizabeth Gaudry, hereinafter referred to as the "Charging Parties." Complaints were filed by the charging parties in the N. L. R. B. regional office in Chicago alleging that Local Lodge 1129 and District Lodge 8 of the International Association of Machinists, hereinafter referred to as the "union," violated §§ 8(b)(1)(A) and 8(b)(2) of the National Labor Relations Act, 29 U. S. C., §§ 158(b)(1)(A), (2), by demanding their discharges for nonpayment of dues after they had resigned from the union.

An Administrative Law Judge who conducted the hearing on the charges declined to rule on the merits of the charges and held that the dispute should have been arbitrated. After considering exceptions filed by the charging parties and their employer, the Board issued a Decision and Order dismissing the complaints.

The charging parties timely filed their petition for review of that decision, and the Court of Appeals granted the motion for leave to intervene of the IAM Local Lodge 1129 and District Lodge 8. The Court assumed jurisdiction under 29 U. S. C., § 160(f).

On July 15, 1976, this court denied the petition for review, Judge Charles E. Wyzanski dissenting. Petition for Rehearing and Suggestion for Rehearing En Banc were denied on October 6, 1976.

The charging parties were long-term employees of Sunbeam Appliance Division of Sunbeam Corp., hereinafter referred to as "Sunbeam," and members of IAM Local Lodge 1129, which, in turn, belonged to District Lodge 8. District Lodge 8 had a collective bargaining agreement with Sunbeam which expired at midnight on January 12, 1973. (App. A, p. 3.)[1]

1. References to appendices are those contained in Petitioners' Brief-in-Chief, in the Court of Appeals.

Prior to the expiration of this agreement, District 8 and Sunbeam negotiated a new agreement for a three-year term ending midnight, January 12, 1976. (App. A, p. 3.) Both agreements contained the following identical "maintenance of membership" clauses:

> "All employees who are members of the union on (January 19, 1970/January 12, 1973) and those employees who may thereafter become members shall, during the life of this agreement as a condition of employment remain members of the union in good standing." (App. A, pp. 7-8.)

Prior to the expiration of the agreement at midnight, January 12, 1973, 71 members of Local Lodge 1129 submitted letters of resignation to the union effective as of the termination of the agreement. (App. A, pp. 4, 9.)

The Board decided that the letters of resignation did not relieve the members of their obligation to pay dues during the term of the contract commencing January 13, 1973. The Board held that the Union did not commit an unfair labor practice in requesting the discharge of the resigning members and dismissed the complaint of the charging parties.

In reaching this conclusion, the Board relied upon the so-called *Paulding* doctrine pertaining to cases in which there is no gap between successive collective bargaining agreements. *International Union, United Automobile Workers (John I. Paulding, Inc.)*, 142 N. L. R. B. 296 (1963). The Board stated (App. B, pp. 3-4):

> "The Board has long held that where, as here, there is no time lapse between the successive collective bargaining agreements and there are closely similar union security clauses, of which maintenance of membership is one form, the union security clauses have continuity and the new contract, at least as to union security, is to be treated as a continuation of the old contract."

The decision of the Court of Appeals did not rely on the Board's *Paulding* doctrine. Instead, it was based upon the court's construction of the maintenance of membership clause contained in the 1973 contract. This clause provided, in effect, that whoever was a member of the union on the last day of the 1970 contract (January 12, 1973) must maintain membership during the life of the 1973 contract. The court stated, 539 F. 2d at 1095:

> "The provision applies to employees who were union members immediately before the effective date of the agreement and employees who thereafter became union members. It does not apply to employees who were not union members immediately before the effective date or future employees."

The court expressly declined to rule on the soundness of the *Paulding* doctrine. It rested its decision on the narrow ground that the charging parties had failed to terminate their membership in the union prior to January 12, 1973, the last day of the 1970 contract. Presumably, if the charging parties had resigned effective January 11, 1973, the court would have reached a different conclusion regarding their obligation to pay dues during the life of the 1973 contract.

REASONS FOR GRANTING THE WRIT.

1. The Right to Resign.

The decision of the Court of Appeals casts an ominous shadow over the right of employees to refrain from engaging in concerted activity protected by § 7 of the National Labor Relations Act.

As the Court of Appeals recognized, 539 F. 2d at 1097, the charging parties had the same right to resign from their union as from any voluntary association. *Communications Workers* v. *N. L. R. B.*, 215 F. 2d 835, 838 (2d Cir. 1954). The 1970 contract did not carry the obligation to maintain membership beyond the end of its term. Thus, when the charging parties submitted their letters of resignation in November and December, 1972, they had no reason to suspect that they were not entirely free to resign effective as of the end of the 1970 contract term at midnight, January 12, 1973.

Only the language in the *1973* contract posed an obstacle to the charging parties' unfettered right to resign. Well aware that 71 of its members had resigned effective midnight, January 12, 1973, the union persuaded Sunbeam to agree on the 12th as the date triggering the maintenance of membership obligation, rather than the 13th.

The decision of the Court of Appeals was based on the literal timing of the charging parties' letters of resignation. If the resignations had been made effective the day before the last day of the 1970 contract term. they would have been effective. Thus, the Court of Appeals sanctioned the selection of a date when employees were free to resign as the trigger date for a new three-year dose of union membership.

This decision gives free rein to unions to thwart the right of employees to resign protected by § 7 of the Act by the simple expedient of keying the union membership obligation to a moment immediately prior to the effective date of attempted resignations. In fact, nothing in the decision of the Court of Appeals would prevent the union from selecting December 12, 1972, as the touchstone for union membership, or an even earlier date. In this manner, a union which got wind of threats of resignation could key membership to a date before their submission, and even letters of resignation made effective immediately could be deprived of their effect.

In endorsing the union's manipulation of the trigger date of the membership obligation, the Court of Appeals has failed to take into account paramount considerations of national labor policy expressed by the Supreme Court concerning the right of employees not to engage in union activity. While the Supreme Court has recognized the importance of the institutional need for union solidarity, it has held that the right of the individual union member to resign takes precedence. Thus, the Court stated in *N. L. R. B.* v. *Textile Workers,* 409 U. S. 212, 217-218 (1972):

> "But where, as here, there are no restraints on the resignation of members, we conclude that the vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May and that his § 7 rights are not lost by a union's plea for solidarity or by its pressures for conformity and submission to its regime."

The rationale of the court's choice between the two competing interests was aptly summarized in the concurring opinion of Chief Justice Burger, *N. L. R. B.* v. *Textile Workers, supra,* at 218:

> "I join the Court's opinion because for me the institutional needs of the Union, important though they are, do not outweigh the rights and needs of the individual. The balance is close and difficult; unions have need for solidarity and at no time is that need more pressing than under the stress of economic conflict. Yet we have given special protection to the associational rights of individuals in a variety of contexts; through § 7 of the Labor Act, Congress has manifested its concern with those rights in the specific context of our national scheme of collective bargaining. *Where the individual employee has freely chosen to exercise his legal right to abandon the privileges of union membership, it is not for us to impose the obligations of continued membership.*" (Emphasis added.)

In the instant case, the Court of Appeals has tipped the scales in favor of the union and against the individual employee, in defiance of the principles enunciated in *Textile Workers.* The majority suggests that, once employees have chosen to join the union, they may be required to maintain membership indefinitely, regardless of the type of union security clause contained in the collective bargaining agreement. 539 F. 2d at 1099. This conclusion, the majority holds, was at least impliedly approved by the Supreme Court in *N. L. R. B.* v. *General Motors,* 373 U. S. 734 (1963) and *Oil Chemical and Atomic Workers International Union* v. *Mobil Oil Corp.,* ..... U. S. ....., 48 L. Ed. 2d 736 (1976).

These cases involved an agency shop, a union security arrangement in which all employees are required to pay a service fee in

lieu of union dues. The Supreme Court upheld the validity of the agency shop as a legitimate union security provision which the union could bargain for in order to compel financial support from employees it represented and prevent "free riders." *N. L. R. B.* v. *General Motors, supra,* at 743.

But the agency shop clause is fundamentally different from the maintenance of membership clause, which makes even "financial core" membership optional. While *General Motors* and *Mobil Oil* hold that a union may legitimately bargain for a union security provision which makes "financial core" membership compulsory, these cases are not authority for the proposition that an employee's choice to support the union during the life of a particular contract is irrevocable.

The Court of Appeals' decision permits the union to grasp indirectly a greater degree of union security than it was able to obtain at the bargaining table, *Communications Workers* v. *N. L. R. B., supra* at 838-839, while at the same time defeating the right of employees to revoke their support of the Union in accordance with the bargained-for maintenance of membership clause and § 7 of the Act.

The decision of the Court of Appeals is also objectionable because the manipulation of the membership date which it permits involves both the union and the employer in multiple unfair labor practices. Sunbeam's agreement to select a date when employees were free to resign as the trigger date for membership obligation during the life of the new contract constituted unlawful support of the union in violation of § 8(a)(2) of the Act. Further, the maintenance of membership clause in the new contract discriminated against the charging parties in regard to tenure of employment in order to encourage membership in a labor organization in violation of § 8(a)(3). As for the union, it violated § 8(b)(1)(A) by accepting the unlawful support and § 8(b)(2) by causing or attempting to cause an employer to discriminate against an employee in violation of § 8(a)(3). *N. L. R. B.* v. *Gottfried Baking Co.*, 210 F. 2d 772 (2nd Cir. 1954).

The inclusion of an illegal union security clause in a collective bargaining agreement violates both §§ 8(a)(1) and 8(a)(2) of the Act. *N. L. R. B.* v. *Gottfried Baking Co., supra; Julius Resnick, Inc.*, 86 N. L. R. B. 38 (1949); Anno: 10 A. L. R. 3d 861, 932-934. The Act is also violated by coercion of employees in implementing the illegal clause. *Colonie Hill Ltd.* v. *N. L. R. B.*, 519 F. 2d 721 (2nd Cir. 1975). Good faith or lack of scienter is no defense to a charge of illegal support in violation of § 8(a)(2). *Garment Workers* v. *N. L. R. B.*, 366 U. S. 731 (1961).

In the *Colonie Hill* case, the employer granted recognition to a union in March 1972 and entered into a collective bargaining agreement with it containing union security and dues checkoff provisions. Charges were filed with the Board challenging the union's majority status. As a result of these charges, the employer entered into a consent agreement whereby the March 1972 agreement was annulled and recognition of the union was withheld until it was certified following a representation election. The union won the election and was certified in December 1972. A new collective bargaining agreement containing a union shop clause was signed in July 1973. The employer fired an employee for refusal to join the union in June 1973.

The court held in *Colonie Hill* that the employer violated §§ 8(a)(1) and (2) of the Act by requiring an employee to join a labor organization in the absence of a valid union security agreement.

In the instant case, the act requiring employees to maintain membership beyond January 12, 1973, was the execution of the 1973 contract containing the contested maintenance of membership clause. This act occurred *before* the effective date of the 1973 contract. Nothing in the 1970 contract required union membership beyond January 12, 1973. Thus, on January 12, 1973, no valid union security agreement was in effect which required maintenance of membership in the union beyond that date. The fact that the request for discharge of the employees

who resigned came some time after the effective date of the 1973 contract is immaterial, when the act which created the contractual basis for the request occurred at a time when no valid union security agreement compelled continued membership in the union.

The maintenance of membership clause in the 1973 contract also violated § 8(a)(3) of the Act. The tendency of the clause to encourage union membership is self-evident, since employees who refused to maintain membership by paying dues faced immediate loss of their jobs. The legality of the clause turns on whether it falls within the first or second proviso to § 8(a)(3).

The first proviso states that an employer is not precluded from making a union security agreement with a labor organization which is "not established, maintained, or *assisted* by any action defined in this subsection as an unfair labor practice. . . ." (emphasis supplied.) Since Sunbeam rendered illegal assistance to the union by agreeing to prolong their membership obligation at a time when no valid union security agreement required such action, the clause is not sanctioned by the first proviso to § 8(a)(3).

The second proviso to § 8(a)(3) states in relevant part:

> "That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members. . . ."

Membership within the meaning of § 8(a)(3) has been defined as the obligation to pay dues and initiation fees, rather than participation in the union as a social organization. As the Supreme Court stated in *N. L. R. B.* v. *General Motors Corp., supra* at 742 (1963):

> ". . . the 1947 amendment not only abolished the closed shop but also made significant alterations in the meaning of 'membership' for the purposes of union security contracts. Under the second proviso to § 8(a)(3), the burdens

> of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned upon only payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core."

In *N. L. R. B.* v. *General Motors Corp., supra,* the Supreme Court declared that less stringent forms of union security agreements than the union shop, including the agency shop, were legitimate. However, this declaration was premised on the assumption of ". . . an agreement in which all employees are *given the option* of becoming, or refraining from becoming, members of the Union." *N. L. R. B.* v. *General Motors, Corp., supra* at 737.

In the instant case, two classes of employees desiring to refrain from union membership existed under the 1973 contract: those who had never belonged to the union and those who resigned effective January 12, 1973. The first group was permitted to avoid "financial core" membership, but the second was not.

This discrimination clearly violates the second proviso of § 8(a)(3). As Judge Wyzanski stated in his dissenting opinion, 539 F. 2d at 1100-1101:

> "But the instant case is not in the familiar pattern. The collective bargain here at issue does not require maintenance of membership of *all* employees in the designated unit, nor is it confined to those employees who when the bargain was made wanted to be members of the union. It goes beyond those who then wanted membership, and seeks to embrace those who vainly had sought to withdraw from an earlier commitment; yet it does not simultaneously embrace those who had never been voluntary members. The inclusion merely of those who had indicated a desire to withdraw has obviously a peculiar characteristic: it is selectively coercive. Its purpose is not primarily to stabilize, but to hold in thrall."

The charging parties have never suggested that the maintenance of membership clause is an impermissible type of union security agreement. If the maintenance of membership clause in the 1973 contract had predicated the obligation to maintain good standing on membership on "the effective date of this agreement" or "January 13, 1973," they could have no objection to its enforcement.[2]

The charging parties' objections are directed at what they regard as a subtle but deliberate attempt to ensnare them in an embrace with a union with which they are dissatisfied, in violation of their right to refrain from participation in concerted activity protected by § 7 of the National Labor Relations Act. It is a right which the Supreme Court has held is entitled to "special protection." *N. L. R. B.* v. *Textile Workers, supra* at 218 (Burger, C. J., concurring). It must be vindicated.

2. The Paulding Doctrine.

If this Court decides that the Court of Appeals erred in its reliance on the literal timing of the charging parties' letters of resignation as the basis for upholding the Board's decision, it may have to confront the *Paulding* doctrine. *International Union, United Automobile Workers (John I. Paulding, Inc.), supra.* It is therefore appropriate to discuss in this petition the reasons why the doctrine should be rejected.

In *Paulding*, the Board has held that, where there is no time lapse between successive collective bargaining agreements containing closely similar union security clauses, the clauses have continuity and the new contract, at least as to union security, must be treated as a continuation of the old contract. 142 N. L. R. B. at 301. *Paulding* dealt with a typical maintenance of membership clause which provided that any employee who was a member of the union on the first day of the contract term or thereafter became a member must maintain membership during the life of the contract. It did not involve an attempt, as in the instant case, to key the membership obligation to membership during the term of a preceding contract.

2. Compare the clauses at issue in *N. L. R. B.* v. *General Motors Corp., supra* at 735, ftn. 3 and *Paulding, supra* at 300.

In a long line of cases, including *Paulding, supra, Hershey Chocolate Corp.*, 140 N. L. R. B. 249 (1962), *International Assn. of Heat Frost Insulators, Local 5*, 191 N. L. R. B. 220 (1971), and *Newspaper Guild of Brockton*, 201 N. L. R. B. 793 (1973), the Board has clung to the notion that the resignation of an employee exercising his right under a maintenance of membership clause to give up union membership at the end of a contract term may be ignored and that he may be required to pay dues against his will during the term of the ensuing contract, simply because there was no hiatus between the two contracts.

The charging parties contend that basic rights conferred by the National Labor Relations Act should not hinge upon the presence or absence of a gap between collective bargaining agreement terms and that such a conclusion on the part of the N. L. R. B. results from a misreading by the Board of its own precedents which cannot withstand the test of logic.

The Board based its decision in this case on *Paulding, supra,* and on *Newspaper Guild of Brockton, supra.*

In *Paulding, supra,* the charging party resigned from her union as of the termination of a collective bargaining agreement and the union demanded her discharge for refusal to pay dues during the succeeding contract. The board held that the union demand was legitimate since there was no gap between the two contracts, the union security clauses had "unmarred continuity" and the second contract, as to union security, should be viewed as a continuation of the preceding contract.

In reaching this conclusion, the Board relied on *National Lead Co., Titanium Division,* 106 N. L. R. B. 545 (1953). In the *National Lead Co.* case the union demanded the discharges of certain employees who refused to pay dues during the terms of an earlier and a succeeding agreement. The

Board held that the expiration of a contract did not bar a union from enforcing dues obligations under the old contract during the term of the new contract. In the *National Lead Co.* case, however, the employees had not attempted to resign from the union.

The *National Lead Co.* case holds only that the dues obligations of a union member are not extinguished by a purely fortuitous event such as the expiration of the term of the contract. It is quite another matter to say that the dues obligations of a union member continue during the term of a new contract when he has resigned prior to the commencement of the new agreement and is no longer a member of the union. The charging parties contend that the *National Lead Co.* case is no support for the Board's conclusion in this case. The existence of a gap between two contracts should have no bearing on the question of whether a union member who resigns effective as of the termination of the old contract is obliged to pay dues by virtue of the maintenance of membership clause of the new contract when he is not a member during the term of the new contract. The language in *National Lead Co.* concerning the continuity of the contractual relationship between the union and the employer assumes the continuity of the contractual relationship between union and employee-member, a fact which is *not* present in the instant case.

Member Fanning disagreed with the majority of the Board in *Paulding, supra* at 301, ftn. 6, because the new contract was executed the morning after the expiration of the old contract; the majority referring to this disagreement said:

> "Member Fanning would not dismiss this aspect of the complaint. As shown by the stipulation of record, Fernandes' membership is Respondents terminated at the precise point in time that the 1961 contract, which obligated her to continue her membership during its term, terminated. This event took place before Respondents and her employer executed the 1962 contract the next morning. It also took place at a moment in time not governed by the terms of the 1962 contract, which were

> applicable to events occurring after the termination of the 1961 contract. The *National Lead* decision is distinguishable because there the 'succeeding' contract was executed prior to the termination of the earlier contract. The *Hershey Chocolate* decision is distinguishable because the 'succeeding' contract actually superseded and extended an earlier contract. Member Fanning concludes that Fernandes effectively resigned her membership in Respondents and that Respondents' attempts to force her to pay dues violated Section 8(b)(1)(A), and its attempts to cause Paulding to discharge her for failing to pay dues violated Section 8(b)(2)."

If continuity of maintenance of membership clauses is dependent upon the timing of the physical execution of the contract, then substantial rights under federal labor law become contingent upon the vagaries of lawyers' workloads, train schedules, or the weather. If, on the other hand, continuity is dependent upon the effective date of the new contract, the right of employees to resign could be defeated by backdating the contract. Congress did not intend rights guaranteed by § 7 of the Act to dangle by such a fragile thread.

The Board itself declined to apply this mechanical test in *Marlin Rockwell Corp.*, 114 N. L. R. B. 553 (1955).[3] In the *Marlin Rockwell Corp.* case, the union demanded the discharge of employees who resigned before the effective date of the new contract for refusal to pay dues under the new contract. Just as in this case, the employees in *Marlin Rockwell Corp.* had paid their dues under the old contract. The Board reasoned that, in order to sustain the union's position, it would be required to construe the term "members" in the maintenance of membership clause of the new contract as meaning "former members," saying at 114 N. L. R. B. 557:

> "The contract in effect on and after November 1953 imposed no express union membership obligations on any employees who were not members of the Union on its 'effective date.' It required only that employees who were

3. The Court of Appeals agreed that *Marlin-Rockwell* was not in harmony with cases applying the *Paulding* doctrine, 539 F. 2d at 1097, ftn. 3.

members on its 'effective date,' or those who thereafter joined the Union voluntarily, would remain 'members in good standing' for the duration of the agreement. The 'effective date' of the agreement was October 12, 1953. The charging employees submitted unequivocal resignations to the Union from union membership in September 1953, before the contract came into being. It is patent, therefore, that unless the Union was entitled to construe the term 'members,' as used in the October 1953 agreement, as including former members who has thus resigned, the complaint must be sustained."

The Board in *Marlin Rockwell Corp.* held that there was nothing in the plain meaning of the maintenance of membership clause of the new contract to justify a construction encompassing former members and that to do so would give the union an advantage which it had been unable to obtain at the bargaining table, stating at 114 N. L. R. B. 557:

"Application of the usual principles of contract construction to the 1953 agreement offers no aid to the Union's position. Nothing in the language of the agreement, or in such other conduct of the parties from which we might otherwise properly determine what the mutual understanding of the parties at the bargaining table in fact was, warrants any inference that the Company granted the Union the exclusive right to determine who were 'members' of the Union on its effective date without regard to the express will of the employees concerned. Indeed, the language of the union-security provisions of the 1953 agreement, fairly construed, tends to establish rather, that the Employer granted the Union less than the full security which the Union could validly have obtained at the bargaining table because he did not wish to burden employees who wished to be 'nonunion' with the *compulsive* condition of union-membership."

The charging parties' union, relying upon *National Lead Co., supra,* argued that the employees were bound by the continuing effect of the maintenance of membership clause in the old agreement, since there was no gap between the contracts. A majority of the Board held that, even if there were no gap, the right of the employees to resign and avoid a dues obligation

under the new contract was protected by § 7 of the Act saying at 114 N. L. R. B. 559-560:

"If, however, the 1950 contract actually remained continuously in effect until October 12, 1953, then, in their view, the Union's valid reliance upon its provisions as a 'bar' to the right of the employees to resign from the Union, would be foreclosed by a line of decisons beginning with the *Union Starch* case. [87 N.L.R.B. 779, enf'd. 186 F.2d 1008 (7th Cir. 1951)].

"In the *Union Starch* case, the Board had before it a situation in which a union holding a valid union-security contract in the fullest form authorized by the proviso to Section 8(a)(3) of the Act, invoked the contract's discharge provisions against employees who were willing to tender dues and fees to the union for the duration of the contract, but who refused, for reasons of their own, to be 'members' of the union. The union viewed the express terms of its contract which imposed the compulsory condition of union-membership on the employees (as authorized by 8(a)(3) as affording it legal rights similar in nature to those claimed by the Respondent Union here. In brief, the union argued that when a union-security contract comes into being, requiring 'membership' as a condition of employment, it has a legal right to treat the arbitrary decision of nonunion employees to remain 'nonunion' as a patent violation of union-security contract's express provisions, and hence to force the employees' discharge. A majority of the Board rejected the union's position upon finding that such position was inconsistent with the legislative scheme of the amended Act. Specifically, the Board indicated that, while the making of a union-security contract in the terms permitted by the proviso to Section 8(a)(3) entitled the contracting union to force nonunion's treasury, such event did not otherwise operate as a suspension of the protected right, guaranteed to employees by Section 7 of the Act, to refrain from union membership and activity at will. The Board held, accordintly, that the mere refusal of the employees to join a union holding a valid union-shop contract, was not the kind of 'violation' of the union-shop contract which the union would lawfully enforce through discharge, or any other action affecting the employees' job security.

"We believe that a ruling here favoring the Respondent Union's construction of the 'right' afforded to it by the 1950 contract would do violence to the principles thus first established by the *Union Starch* case. For we regard the withdrawal by employees from a union to be an act not qualitatively different from the refusal by employes *to join* a union. It follows, therefore, that the Respondent Union's statutory privilege to use a union-security contract—no matter how worded—as a reason for denying the effectiveness of the employees' independent decision to reject union 'membership' status, can be no greater in the former type of situation than it is in the latter. As there is no valid contention here that the charging employees were unwilling to contribute dues for the duration of the 1950 contract, it follows that the position taken by the Respondent Unions here is subject to the identical considerations underlying the Board's treatment of the position taken by the contracting union, respondent in the *Union Starch* case. We hold, accordingly, that, whether or not the 1950 contract remained continuously in force after September 15, and up to October 12, 1953, its provisions did not and could not validly supply any basis for depriving the employees of a right to sever their affiliation with the Union at will."

The Board concluded that it could not sit in judgment concerning the wisdom of the exercise of the employees' "unqualified" right to resign protected by § 7 of the Act, and, if employees elected to terminate their membership prior to the effective date of a new contract, no dues obligation could be enforced during its term. The Board said in 114 N. L. R. B. at 562:[4]

". . . we read the provisions of Section 7 of the Act as affording to employees an equally unqualified and independent privilege to determine whether they will or will not be 'union members." For this reason, in a situation of the kind presented here, the Board cannot and will not judge the reasonableness or unreasonableness of any clearly evidenced act of employees establishing their intent to be nonunion. Nor can it interpret such employee action in terms of either a bargaining agreement's language or that in an intraunion membership contract. For to do so would disregard the provisions of Section 7 of the Act.

"There is no ambiguity here in the employees' declarations in the letters they submitted to the Union in September 1953. The employees declared there in clear and unequivocal terms that they no longer desired to be members of the Union. Their union membership status therefore ceased as of the date they submitted their unequivocal resignations, and their nonmember status afforded them protection against compulsive pressures affecting their job security exerted here as a means of compelling their continuing dues contributions to the Union at a time when they were not required by the then current bargaining agreement to again join the Union."

4. The Board also held that *National Lead Co., supra,* was inapposite because the question of the employees' membership status in that case did not arise. 114 N. L. R. B. at 562, ftn. 19.

In its decision in this case, the Board also relied on *Newspaper Guild of Brockton, supra.* The *Brockton* case involved an attempt by a union to enforce a maintenance of membership clause against employees who resigned prior to the commencement of a new contract. The Board in *Brockton* held that the question of whether the maintenance of membership clause was binding upon the employees during the term of the new contract was one of contract interpretation appropriately decided by arbitration in the first instance under the doctrine of *Collyer Insulated Wire,* 192 N. L. R. B. 837 (1971).

Here the Board ruled that deferral to arbitration was not appropriate because neither the union nor the company could be counted upon to adequately represent the charging parties. The charging parties agree with this conclusion. However, it does not follow that their complaints should be dismissed. In fact, in dismissing the complaints, the Board construed the maintenance of membership clauses in a way which it condemned in the *Brockton* case.

The Board's decision to dismiss the complaints of the charging parties denied them relief both under a contractual and

statutory theory. The plain meaning of the standard maintenance of membership clause is that only employees who are members of the union on its effective date or who thereafter become members are required to maintain membership and to pay dues.[5] The union relies on a Board rule of contract interpretation to achieve a result contrary to the will of the employees and inconsistent with the plain meaning of the English language.

The Board has declined to permit the charging parties a hearing in any forum. This manifest injustice is an abandonment by the Board of its statutory responsibilities, and this court should reverse the ruling of the Court of Appeals.

Additionally, the *Paulding* doctrine is at odds with the Supreme Court's endorsement of the right to resign in *Textile Workers, supra,* a point which is illustrated by the bargaining history of the union and employer in the instant case.

The 1964 contract between the union and Sunbeam contained a two-week escape period immediately prior to the expiration of the contract during which employees were expressly permitted to withdraw from union membership. The 1967, 1970, and 1973 contracts all contain the following language:

> "The Company has no interest in whether or not any employee joins or remains a member of the Union. That matter is entirely up to the voluntary decision of each employee. Any employee's Union affiliation, or lack of affiliation, will in no respect influence the Company as to such employee's relations with the Company in regard to his work."

The 1973 contract *added* that: "The union agrees that neither it nor any of its officers or members will intimidate or coerce employees into membership in the union." (App. A, pp. 6-8.)

5. The charging parties recognize that the instant case does not involve the standard maintenance of membership clause, because the membership obligation is keyed to the last day of the old contract instead of the first day of the new one. But, for the reasons expressed earlier herein, they contend that such manipulation of the key date is contrary to the provisions of the Act and national labor policy.

Apparently, the question of union coercion of Sunbeam employees was a sore spot during negotiations and the company was sufficiently concerned to insist that this additional protective language be included. This court should not permit the union to subvert its solemn promise to respect the individual rights of employees to refrain from collective activity by upholding a strained and irrational construction of the standard maintenance of membership clause. Rights guaranteed by § 7 of the act should not be so easily undermined.

The Board's treatment of the standard maintenance of membership clause in *Paulding* conflicts with the plain meaning of the contractual language, the Board's own precedent set in *Marlin Rockwell Corp., supra,* and the clear enunciation of the right to resign made by this Court in *Textile Workers, supra.*

The instant case presents the Court with the opportunity to rid the body of federal labor law of a doctrine which finds no support in logic, law, or sound policy. Petitioners believe that the opportunity should be seized.

CONCLUSION.

For the foregoing reasons, and especially because of the grave questions presented regarding the vitality of the right not to engage in union activity protected by § 7 of the National Labor Relations Act, Petitioners respectfully suggest that the instant case is worthy of review by this Court, and that the Court should issue its Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JEFFREY LAWRENCE,
GEORGE E. FABER,
53 West Jackson Boulevard,
Chicago, Illinois 60604,
Attorneys for Petitioners.

APPENDIX A.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LODGE NO. 1129, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and VICTORIA HORWATH, an Individual, and SUNBEAM APPLIANCE COMPANY, DIVISION OF SUNBEAM CORPORATION, *Party to the Contract,*	Case 13-CB-5038
LODGE NO. 1129, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT NO. 8, AFL-CIO, and ELIZABETH GAUDRY, an Individual, and SUNBEAM APPLIANCE COMPANY, DIVISION OF SUNBEAM CORPORATION, *Party to the Contract.*	Case 13-CB-5039

DECISION AND ORDER

On April 16, 1975, Administrative Law Judge Lowell Goerlich issued the attached Decision in this proceeding. Thereafter,

the Charging Parties filed exceptions and a brief. The Party to the Contract filed exceptions and a brief, and the Respondent filed a motion to strike said exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge to the extent consistent herewith.

The facts are not in dispute. Briefly, the Respondent and the Employer had entered into a collective-bargaining agreement which required employees who were or became members of the Respondent to remain members during the term of the contract. The contract expired at midnight on January 12, 1973. Prior to the expiration of that contract, the Respondent and the Employer entered into a new collective-bargaining agreement which contained a similar maintenance-of-membership clause. As the new agreement took effect upon the expiration of the old, there was no hiatus between the contracts. No escape period was written into the 1973 contract.

Prior to January 12, 1973, the Charging Parties herein submitted to Respondent resignations effective on or before January 13. The employees ceased paying dues after January 12. In October 1973 and again in February 1974, Respondent informed the employees that it would request their discharge if their dues were not fully paid. On February 28, 1974, Respondent requested the Employer to terminate the employees who had not paid dues.

The Administrative Law Judge concluded that this proceeding should be deferred to the grievance-arbitration procedure of the collective-bargaining agreement. We do not agree. Respondent, which seeks arbitration, is in a position adverse to the employees who are the Charging Parties herein. Unlike *The Newspaper Guild of Brockton, AFL-CIO (Enterprise Publishing Company)*, 201 NLRB 793 (1973), which was relied upon by the Administrative Law Judge, the Employer herein is not the charging party and has not thereby aligned itself with the employees alleging discrimination. The Employer has not otherwise indicated that it is willing to pursue the rights of the Charging Parties through the grievance-arbitration procedure but, to the contrary, has indicated it is opposed to arbitration.[1] Thus, no party to the contract, and to the arbitration provisions thereof, supports the employees who have the grievance. We will not defer to arbitration in these circumstances for to do so would place the employees at the mercy of those who allegedly wronged them.[2]

Respondent threatened and sought to have the Charging Parties discharged solely because they had not paid their dues. Thus, the issue here is whether the Charging Parties, by submitting resignations from Respondent, escaped the contractual obligation to pay dues. We find that they have not. The Board has long held that where, as here, there is no time lapse between successive collective-bargaining agreements and there are closely similar union-security clauses, of which maintenance of membership is one form, the union-security clauses have continuity and the new contract, at least as to union security, is to be treated as a continuation of the old contract. *International Union, United Automobile, Aerospace, Agricultural Implement Work-*

1. Respondent moved to strike the Employer's exceptions on the ground that the Employer is not a proper party to this proceeding. Whether we grant or deny the motion is immaterial to this proceeding. As the Respondent would agree to accepting the Employer's exceptions as an *amicus curiae* brief, we would in either event have the Employer's position with respect to arbitration before us for consideration. In addition, the crucial fact remains that no party to the contract has indicated a willingness to support the Charging Parties herein in any arbitration proceeding.

2. For the reasons set forth in *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971), and related cases, Member Jenkins would not have in any event deferred this case to arbitration.

ers of America (UAW), AFL-CIO (John I. Paulding, Inc.), 142 NLRB 296, 301 (1963). This principle was recently affirmed in *The Newspaper Guild of Brockton, AFL-CIO, supra.* Accordingly, we find that the 1973 contract herein, at least as to the maintenance-of-membership clause, is to be viewed as a continuation of the 1970 contract and that the obligation of the Charging Parties to abide by the clause and pay dues also continued.

As we have found that the Charging Parties are obligated by the collective-bargaining agreement to continue to pay dues to Respondent, Respondent was within its rights to request the discharge of the Charging Parties for failure to pay dues. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Sectin 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C. Aug. 8, 1975.

Betty Southard Murphy,
Chairman.

Howard Jenkins, Jr.,
Member.

John A. Penello,
Member, National Labor Relations Board.

(SEAL)

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 75-1805

VICTORIA HORWATH and ELIZABETH GAUDRY,
Petitioners-Appellants,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent-Appellee,

and

LOCAL LODGE 1129 and DISTRICT LODGE 8,
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
Intervening Respondents-Appellees.

Appeal from Decision of the National Labor Relations Board

ARGUED APRIL 9, 1976—DECIDED JULY 15, 1976

Before CUMMINGS, TONE, *Circuit Judges,* and WYZANSKI, *Senior District Judge.**

TONE, *Circuit Judge.* The issue before us is the validity of a maintenance-of-membership provision in a collective-bargaining agreement. The provision applies to employees who were union members immediately before the effective date of the agreement and employees who thereafter become union

* The Honorable Charles E. Wyzanski, Jr., Senior District Judge of the District of Massachusetts, is sitting by designation.

members. It does not apply to employees who were not union members immediately before the effective date or future employees. The National Labor Relations Board sustained the union's position that such a provision is lawful when the collective bargaining agreement becomes effective immediately on the expiration of a predecessor agreement containing a similar provision. The Board therefore held that the union had not committed an unfair labor practice under § 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(1)(A) and (2), by demanding that the employer discharge employees who, having resigned from the union effective upon the expiration of the old contract, ceased paying dues when the new contract became effective. We sustain the Board.

Since 1964 an uninterrupted series of collective bargaining agreements have been in force between the employer, Sunbeam Corporation's Appliance Division, and the union, Lodge No. 1129 and District No. 8 of the International Association of Machinists and Aerospace Workers. Each agreement has contained a maintenance-of-membership clause providing as follows:

> "All employees who are members of the Union on [a given date], and those members who may thereafter become members shall, during the life of this Agreement remain members of the Union, in good standing."

The 1964 agreement contained an escape clause establishing a period during which union members could resign from the union. The maintenance-of-membership clause of that agreement applied only to employees who were members of the union on the day after the escape period ended. The escape clause was omitted from subsequent contracts, but the maintenance-of-membership clause in the 1970 contract, which immediately preceded the contract in issue here, applied only to employees who were union members one week after the effective date of the contract. The 1970 contract terminated and the

1973 contract now before us became effective at midnight on January 12, 1973. The maintenance-of-membership clause in the 1973 contract applied to "[a]ll employees who are members of the Union on January 12, 1973."

Petitioners are Sunbeam Appliance Division employees who resigned their union memberships before the expiration of the 1970 contract but continued to pay dues until the contract expired. In accordance with petitioners' view of the facts, we treat the resignations as effective upon the expiration of that contract at midnight on January 12, 1973.[1] Following notification by the union that it would invoke its rights under the maintenance-of-membership clause if petitioners did not pay their dues, they filed unfair labor practice charges before the Board, which were dismissed by the Board's Chicago Regional Director but reinstated by the General Counsel's Office of Appeals. The employer has refused, pending the outcome of this proceeding, the union's request that petitioners' employment be terminated.

After a hearing,[2] the Administrative Law Judge ordered that the dispute be submitted to arbitration pursuant to the

1. The written resignations are not in the record. According to the stipulation of facts entered into between the General Counsel and the union (to which petitioners now object, see note 2, *infra*) and submitted to the Administrative Law Judge, the resignations were effective "on or before January 13, 1973," the effective date of the new contract. In their brief in this court petitioners take the position that the resignations took effect not on January 13 but "as of the termination of the old contract at midnight, January 12." We resolve the ambiguity in the stipulation in favor of petitioners and accept their position as to when the resignations became effective.

2. Petitioners now complain that they were pressured into proceeding without counsel and accepting a stipulation of facts which was agreed to by the General Counsel and the union. The record, although it is interrupted by several off-the-record discussions, demonstrates that the ALJ proceeded with scrupulous attention to their rights. He fully informed them of their right to be represented by an attorney, and, before any motion for a continuance was made, offered to continue the proceedings so they could obtain counsel. The record shows that at least one petitioner (Horwath) had previously

(Continued on next page)

collective bargaining agreement between the union and the company. On review, the Board ruled out arbitration because neither party to the arbitration would be supporting petitioners' position. Proceeding to the merits, the Board ordered the complaint dismissed, stating:

> "The Board has long held that where, as here, there is no time lapse between successive collective-bargaining agreements and there are closely similar union-security clauses, of which maintenance of membership is one form, the union-security clauses have continuity and the new contract, at least as to union security, is to be treated as a continuation of the old contract. *International Union, United Automobile, Aerospace, Agricultural Implement Workers of America (UAW), AFL-CIO (John I. Paulding, Inc.)* 142 NLRB 296, 301 (1963). This principle was recently affirmed in *The Newspaper Guild of Brockton, AFL-CIO*, [201 N.L.R.B.] 793 (1973). Accordingly, we find that the 1973 contract herein, at least as to the maintenance-of-membership clause, is to be viewed as a continuation of the 1970 contract and that the obligation of the Charging Parties to abide by the clause and pay dues also continued."

Construction of the Agreement

The *Paulding* doctrine, on which the Board based its interpretation of the contract, has been applied in a series of Board cases, all holding that successive union security clauses are to be construed as merged into a single, continuing requirement

(Continued from preceding page)

been represented by an attorney in the dispute. When the motion for a continuance was withdrawn, the ALJ again made it clear that the decision was up to them, not him. As for the stipulation, the only specific objection petitioners make here relates to the effective date of their resignations, a point we resolve in their favor. See note 1, *supra*. Petitioners did not specify what other part of the stipulation they found objectionable or what additional evidence they wished to present. They merely disagreed with the General Counsel's statements concerning the extent to which they had been consulted concerning the stipulation. Under these circumstances, we must reject these procedural objections.

of union membership. See, in addition to the cases cited by the Board in the above-quoted passage, *Hershey Chocolate Corp.*, 140 NLRB 249, 253-255 (1962); *International Association of Heat Frost Insulators, Local 5*, 191 NLRB 220, 221 (1971), *enforced*, 464 F.2d 1394 (9th Cir. 1972) (mem.). Thus, in *Paulding*, the Board held that even though there was a short gap between the expiration of the old agreement and the commencement of the new (both containing maintenance-of-membership provisions applicable to employees who were union members on their effective date), the new agreement was to be viewed as a continuation of the old, and employees who resigned their union membership effective the last day of the old agreement were subject to the maintenance-of-membership provision.[3]

We need not pass upon the soundness of the *Paulding* doctrine, for the language of the maintenance-of-membership provision before us is open to only one reading. The provision applies to all employees who were union members on January 12, 1973, which was the last day of the previous contract. Petitioners were union members on that date, since their resignations became effective at midnight on that date, when the previous contract expired. Accordingly, the provision plainly required that each petitioner maintain his union membership as a condition of continuing in his employment.[4]

3. Apparently inconsistent with *Paulding* is the earlier decision in *Marlin Rockwell Corp.*, 114 NLRB 553 (1955), where the Board held that employees who had resigned from the union but had continued to pay dues until the termination of the collective bargaining agreement, were not covered by the maintenance-of-membership clause in a succeeding agreement.

4. Normally, of course, we would not affirm an agency action on a ground not relied upon by the agency. *SEC* v. *Chenery Corp.*, 318 U. S. 80 (1943). This is an exceptional case in which remand to the agency for consideration of alternative grounds would not be appropriate even if we rejected the grounds the agency relied on. The petitioners in their reply brief have asked us to apply ordinary rules of contract construction and could not consistently ask the Board to do otherwise on remand. The Board's application of those rules is not entitled to extraordinary judicial deference, *Texas Gas*

(Continued on next page)

Legality of the Maintenance-of-Membership Clause

Petitioners' argument that the maintenance-of-membership clause is invalid is based primarily upon certain language in *NLRB* v. *Textile Workers Union*, 409 U. S. 213, 216 (1972),[5] in which the Court applied § 7 of the Act (28 U. S. C. § 157). That section guarantees to employees both the right to join labor organizations and the right not to join.

(Continued from preceding page)

Transmission Corp. v. *Shell Oil Co.*, 363 U. S. 263, 268-269 (1960), and if the Board reached any result but the one indicated in the text, we would reverse. In this situation, the following remarks by Justice Fortas are apposite:

> "To remand would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency into a ping-pong game. In *Chenery*, the Commission had applied the wrong standards to the adjudication of a complex factual situation, and the Court held that it would not undertake to decide whether the Commission's result might have been justified on some other basis. Here, by contrast, the substance of the Board's command is not seriously contestable. There is not the slightest uncertainty as to the outcome of a proceeding before the Board, whether the Board acted through a rule or an order. It would be meaningless to remand." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 767 n.6 (1969) (plurality opinion).

5. "Under § 7 of the Act the employees have 'the right to refrain from any or all' concerted activities relating to collective bargaining or mutual aid and protection, as well as the right to join a union and participate in those concerted activities. We have here no problem of construing a union's constitution or by-laws defining or limiting the circumstances under which a member may resign from the union. We have therefore, only to apply the law which normally is reflected in our free institutions —the right of the individual to join or to resign from associations, as he sees fit 'subject of course to any financial obligations due and owing' the group with which he was associated. *Communications Workers* v. *N.L.R.B.*, 215 F.2d 835, 838."

See also Chief Justice Burger's concurrence, 409 U.S. at 218:

> "[T]hrough § 7 of the Labor Act, Congress has manifested its concern with those rights in the specific context of our national scheme of collective bargaining. Where the individual employee has freely chosen to exercise his legal right to abandon the privileges of union membership, it is not for us to impose the obligations of continued membership."

In the *Textile Workers* case the issue was whether it was an unfair labor practice for the union to attempt to fine employees who had resigned from the union during a strike and returned to work while the strike was still going on. Neither the constitution nor the by-laws of the union purported to restrict the right of a member to resign. The Court decided only that under these circumstances § 7 protected the employees' right to resign and that once they had resigned the union had no right to attempt to control them. The case presented no issue concerning a union-security clause or § 8(a)(3).

Section 7 expressly provides that the right to refrain from concerted activity "may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [§ 8(a)(3)]." Thus it is § 8(a)(3) and not § 7 which determines the validity of a maintenance-of-membership provision.

Section 8(a)(3) provides as follows:

> "It shall be an unfair labor practice for an employer—
>
> . . .
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in [§ 9(a)], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in [§ 9(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the

employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

The first proviso of § 8(a)(3) specifically authorizes "union shop" agreements, under which all employees are required to join, and remain, members of the union as a condition of employment.[6] The word "membership" in the first proviso is qualified, however, by subdivision (B) of the second proviso, as the Supreme Court has recognized:

> ". . . It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core." *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963).

Thus § 8(a)(3) merely allows the union to require financial support and not membership in any other sense.[7] Accordingly

6. The first proviso is qualified by § 14(b) of the Act, as amended, 29 U. S. C. § 164(b), which "allows individual States and Territories to exempt themselves from § 8(a)(3) and to enact so-called 'right-to-work laws' prohibiting union or agency shops." See *Oil, Chemical & Atomic Workers Int'l Union* v. *Mobil Oil Corp.*, 44 U. S. L. W. 4832, 4843 (1976).

7. The union may, however, choose to extend "membership" to any employee who pays fees and dues, even though he "refuses to support or 'join' the union in any other affirmative way." *NLRB* v. *General Motors Corp.*, 373 U. S. at 744. An agency shop agreement "removes that choice from the union and places the option of membership in the employee while still requiring the same monetary support as does the union shop." *Id.*

the Court held in *General Motors* that the statute permitted an "agency shop" agreement, which only requires employees to pay fees and dues to the union as a condition of employment. Such an agreement, said the Court, "imposes no burden not imposed by a permissible union shop contract and compels the performance of only those duties of membership which are enforceable by discharge under a union shop arrangement." *Id.* at 743.

Although the holding of the case rested on a reading of the two provisos of § 8(a)(3), the second of which reflects Congress' intent to limit compulsory support of unions to financial support, one passage in the opinion is instructive in connection with the issue before us, which is whether the statute also authorizes another kind of union-security clause less restrictive than a union shop provision. The Court said:

> "We find nothing in the legislative history of the Act indicating that Congress intended the amended proviso to § 8(a)(3) to validate only the union shop and simultaneously to abolish, in addition to the closed shop, all other union-security arrangements permissible under state law. There is much to be said for the Board's view that if Congress desired in the Wagner Act to permit a closed or union shop and in the Taft-Hartley Act the union shop, then it also intended to preserve the status of less vigorous, less compulsory contracts which demanded less adherence to the union." 373 U.S. at 741.

Under an agency-shop provision, which *General Motors* holds is sanctioned by § 8(a)(3), all employees must pay dues, both those who are paying dues on the day a former contract expires and those who are employed thereafter. Under such a contract, no employee ever has a choice whether to support the union financially. Under the contract challenged here, each employee at some time had or will have such a choice. That is the essential difference between the two kinds of provisions. Once the choice in favor of supporting the union is made, the employee's obligation is not different from the obligation imposed by an agency-shop provision.

The challenged provision makes a classification which is not invidious. On the one hand, required to support the union by paying fees and dues are those employees who, when they had their opportunity to choose, made that choice in favor of supporting the union. On the other hand, not required to support the union financially are the remaining employees, who, at the time of their opportunity to choose, made or will make the election against supporting the union.

Petitioners do not attack the Board's ruling on constitutional grounds. With respect, we do not believe the constitutional argument suggested in the dissent is well founded, even assuming that the Board's failure to prevent the union from enforcing its contractual rights converts the exercise of those contractual rights into federal action. As for the First Amendment argument, the constitutionality of the first proviso of § 8(a)(3), which allows maintenance-of-membership provisions applicable to all employees, is not questioned. Where the only obligation of membership is payment of dues, it is no greater an intrusion on First Amendment rights to restrict an employee's ability to resign from membership than it is to require him to join in the first place. Whether an employee's First Amendment right to freedom of association has been violated by forcing him to support a union cannot depend on whether other employees are similarly coerced. If it is suggested that the distinction between classes of employees is a violation of the equal protection guaranteed by the Due Process Clause of the Fifth Amendment, we think the distinction is not invidious and is justified for the reason stated in the preceding paragraph.

The maintenance-of-membership provision before us serves to a limited degree the interest of union security which Congress recognized in the first proviso of § 8(a)(3),[8] while accommodating to some extent the competing interest of employees which Congress has also recognized in that section[9] and in §§ 7 and 14 of the Act. If such less restrictive provisions as the one at bar were impermissible and the union's options were thus limited to the extremes of an all-employee provision on the one hand and no effective maintenance-of-membership provision at all on the other, Unions might be driven to insist on all-employee provisions in their collective bargaining agreements, with the result that fewer employees throughout industry would be free to choose whether to pay union fees and dues.

8. See *Oil, Chemical & Atomic Workers Int'l Union* v. *Mobil Oil Corp., supra,* n.6, 44 U. S. L. W. at 4845:

> "Congress' decision to allow union security agreements at all reflects its concern that, at least as a matter of federal law, the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them."

We sustain the Board's holding that the Act does not prohibit a maintenance-of-membership provision which imposes no restrictions on new employees and is no more resrtictive upon old employees than an all-employee provision expressly sanctioned by the first proviso of § 8(a)(1).[10] The petition for review is denied.

WYZANSKI, *Senior District Judge,* dissenting. In the N. L. R. Act, Congress recognized two competing interests: the right of a union to make with an employer a collective bargain which would require employees to contribute dues which would fairly match the services they received, maintain the strength of the

9. See Justice Stewart, dissenting in the *Oil, Chemical & Atomic Workers* case, *supra,* n.6, 44 U. S. L. W. at 4848:

> "Section 8(a)(3) was designed to curb the abuses of compulsory unionism, which 'create[d] too great a barrier to free employment,' S. Rep. No. 105, 80th Cong., 1st Sess., 6 (1947), but at the same time, to continue to afford unions a measure of security by enabling them to prevent 'free riders.' *Id.*, at 6."

10. Although the present issue was not before the Court in the recent *Oil, Chemical & Atomic Workers* case, *supra,* n.6, it is not irrelevant that the first proviso was there described by Justice Marshall, speaking for the Court, as referring to "lesser union security agreements" than closed shops, 44 U. S. L. W. at 4845, n.9, and "union security agreements less onerous than the closed shop agreement," *id.* at 4845, and by Justice Stewart in dissent as sanctioning "any less security arrangement . . . only if it harmonizes with state policy," *id.* at 4848. (The "only if" clause refers to § 14(b). See note 6, *supra.*) These descriptions are perhaps some indication of the Court's reading of the proviso, although they are of course not compelling.

union, and promote stability of employment relations and thus industrial peace, and the right of the individual employees to freedom of speech. Hence, there is Congressional sanction for a maintenance of membership clause within the limits specified by Section 8(a)(3) of the N. L. R. Act, 29 U. S. C. § 158(a)(3). *NLRB* v. *General Motors Corp.*, 373 U. S. 734 (1963); *Radio Officers Union* v. *Labor Board*, 347 U. S. 17, 41 (1954); *NLRB* v. *Hershey Foods Corp.*, 513 F. 2d 1983, 1085-1086 (C. A. 9, 1975).

But the instant case is not in the familiar pattern. The collective bargain here at issue does not require maintenance of membership of *all* employees in the designated unit, nor is it confined to those employees who when the bargain was made wanted to be members of the union. It goes beyond those who then wanted membership, and seeks to embrace those who vainly had sought to withdraw from an earlier commitment; yet it does not simultaneously embrace those who had never been voluntary members. The inclusion merely of those who had indicated a desire to withdraw has obviously a peculiar characteristic: it is selectively coercive. Its purpose is not primarily to stabilize, but to hold in thrall. Such eclecticism has an object ulterior to the two rights which Congress recognized. And that object is an interference with the freedom of association impliedly protected by the First Amendment to the Constitution, —an interference for which there is not an adequate ground plausibly to contend that the purpose of the First Amendment is counter-balanced.

The flaw in the majority opinion, in my judgment, is that it rests on what is a sound mathematical, but not always a sound legal, principle: that the whole necessarily includes the parts. Selectivity of a part may have, and indeed here has, an invidious connotation which would be absent had the whole been embraced.

A true Copy:

Teste: /s/ C. JEDZINICK, DEP.
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C.

TITLE 29, UNITED STATES CODE, § 157

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

TITLE 29, UNITED STATES CODE, § 158(a)(2) and (3)

"(a) It shall be an unfair labor practice for an employer—

* * * * *

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 USCS § 156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [29 USCS §§ 151-158, 159-168], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in

section 9(a) [29 USCS § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held as provided in section 9(e) [29 USCS § 159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

TITLE 29, UNITED STATES CODE, § 158(b)(1)(2)

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."